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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1284

AMOCO OIL COMPANY,

Petitioner,

vs.

OIL, CHEMICAL AND ATOMIC WORKERS, INTERNATIONAL UNION, LOCAL 7-1, INC. AND PAUL A. SEMAN,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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OIL, CHEMICAL AND ATOMIC WORKERS, INTERNATIONAL UNION, LOCAL 7-1, INC. AND PAUL A. SEMAN,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioner requests that a Writ of Certiorari issue to review the judgment of the Court of Appeals for the Seventh Circuit entered in the above cause January 24, 1977.

OPINIONS BELOW

The opinion of the Court of Appeals has not been reported. A copy is appended as Appendix I. The Order and Memorandum of the District Court entered January 30, 1976, its Order granting respondents' Motion For Reconsideration entered February 26, 1976, and its Orders of April 13, 1976, are appended as Appendix II. The Arbitrator's Report and Decision, and Award are appended as Appendix III.

JURISDICTION

The judgment of the Court of Appeals was entered January 24, 1977. The jurisdiction of this Court is invoked pursuant to 28 U. S. C. §§ 1254(l) and 2101(c).

QUESTIONS PRESENTED

1. Whether *United Steelworkers of America* v. *Enterprise Wheel & Car Corporation*, 363 U. S. 593 (1960), provides lower federal courts any guidance in judicial review of fundamentally irrational arbitrators' decisions.

2. Whether the Court of Appeals' judgment enforcing a fundamentally irrational arbitrator's order should be reversed since the court redetermined the merits of the submission.

3. Whether the Court of Appeals erred in affirming an arbitrator's order where the arbitrator exceeded the authority granted under the collective bargaining agreement.

STATEMENT OF THE CASE INCLUDING BASIS FOR FEDERAL JURISDICTION

Petitioner is Amoco Oil Company, a Maryland corporation. Respondent Seman was employed by petitioner ("Seman") and is a member of respondent Oil, Chemical and Atomic Workers, International Union, Local 7-1, Inc. (the "Union").

Seman was discharged by petitioner on September 14, 1973. The facts leading to his discharge were found by the arbitrator to be as follows:

> "At 11:00 p.m. on September 11, 1973, the Whiting Fire Department answered a 'fire in progress' call to the Grievant's home. In battling the blaze in the Grievant's basement, fire department personnel noted equipment with AMOCO markings on them. The fire was eventually put out. The following morning at approximately 10:00 a.m.,

> fire and police investigators reviewed the situation in the Grievant's basement and took many photographs of the basement and its contents. Seen in photographs were many items of equipment which belonged to AMOCO. This fact was not disputed by the Grievant. *The record was replete with evidence of Company equipment being in the Grievant's* basement, and since there was no denial that the equipment was there, it is taken as true.
>
> "The following day, September 12, shortly before 5:00 p.m., the Whiting Police Department placed the Grievant's residence under surveillance, since the Company had been informed of their equipment being in the Grievant's basement, and the police wished to prevent the unobserved removal of any of this equipment prior to action being taken. That action was taken on the following day, September 13, in the form of a search warrant. Shortly before 6:00 p.m., Whiting Police accompanied by Company officials, served the search warrant and began to remove equipment belonging to the Company from the Grievant's basement. *Approximately $30,000.00 worth of equipment was removed,* including items such as the following:
>
> 43 Chain Lifts — 7 Chipping Guns
> 11 Ladders — 3 Jackhammers
>
> "The equipment covered space in a warehouse which probably measured 30′ x 15′, stacked up to several feet high. It took 4 to 6 hours to finish removing all of the equipment from the Grievant's basement and loading it on flat bed trucks. This ran until late in the evening, and during the time of the removal of the equipment, practically the entire City Government turned out to watch the activities. Unrebutted testimony revealed that practically the entire City Government was in attendance, including the City Judge, the City Attorney, the City Engineer, six out of seven Councilmen and the Mayor, among others. Evidence further showed that a table was set up and coffee and doughnuts were being dispensed by several wives and secretaries of the above.
>
> * * * * *
>
> "Testimony revealed that many of the items in the basement of the Grievant's home, belonging to AMOCO, were

too heavy for one man to lift and required two men to drag them across the floor and remove them from the basement. Further unrebutted testimony revealed that the Grievant did not drive, did not own a car, and was always seen going to and coming from work on a bicycle." (App. III, pp. A36-A38) (Emphasis added.)

Criminal charges were filed against Seman. The search warrant was quashed and the evidence suppressed. The charges were thereafter dismissed. (App. III, p. A37)

Seman filed a grievance pursuant to the collective bargaining agreement then in effect between petitioner and the Union. That agreement provided, *inter alia,*

> "It is not the purpose of this Agreement in any way to infringe the normal Management rights of the Company except as otherwise expressly provided. Included among the Management rights unaffected are the right to hire and the right to discipline or discharge employees for just cause."

The following issue was, therefore, submitted to the arbitrator:

> "Was the Grievant, Paul A. Seaman [sic], discharged for just cause? If not, what is the remedy?" (App. III, p. A35)

Based upon the facts before him, the arbitrator found:

> "To begin with, the Company on September 14, 1973, had just cause to discharge the Grievant. He admittedly had in his possession Company equipment valued at over $30,000.00, which equipment he had no right to have." (App. III, p. A42)

The Union defended Seman throughout the course of the proceedings on the theory that his possession of petitioner's property was a result of a strategem of a group of unknown conspirators who sought to incite his discharge. This theory prevailed with the arbitrator who stated:

> "I am not convinced beyond doubt that the Grievant was aware of this Company material in his basement. The motives of Governmental agencies, combined with their bizarre actions of the week of September 11, added to by

> the apparent inability of the Fire Department to discover in 18 months what was found in a matter of a week or two by a qualified insurance investigator, all add up to a possible, *though certainly in no way proved,* alternative to the placement of the material in the Grievant's basement by himself. *The Grievant alleges conspiracy, but has not proved it.* Most frankly, however, he has raised enough doubts so that I believe the level of proof of his complicity does not reach that required to sustain his discharge." (App. III, p. A45) (Emphasis added.)

The arbitrator ordered Seman reinstated by petitioner, stating:

> "Thus, I find that as of October 6, 1975, the Company does not have just cause for discharging the Grievant, *although they had just cause from the knowledge in their possession on September 14, 1973.*" (App. III, p. A45) (Emphasis added.)

Having ordered reinstatement, he was confronted under the agreement with seniority and back pay issues. He determined Seman should retain his seniority but that he was not entitled to back pay. The arbitrator's reasoning was as follows:

> "What is the Company liability for their actions of September 14? The Grievant has admitted, and I agree with him, that he has no proof whatsoever of any Company involvement in any conspiracy. If an outside group conspired to 'set up' the Grievant so that he would be discharged, then the Grievant's remedy for his damages must be against that group, *not against the Company, who acted with just cause when they acted.* Therefore, I find that the Grievant is entitled to reinstatement without loss of seniority, but without back pay. If, in fact, some outside organization deprived the Grievant of two years employment and pay, *which is not found herein to be a fact,* then the Grievant will have to obtain, in other forums, satisfaction for that wrong." (App. III, p. A45) (Emphasis added.)

Petitioner filed a motion to vacate the arbitrator's award in the United States District Court for the Northern District of Indiana, pursuant to the provisions of the Federal Arbitration Act, 9 U. S. C. §§ 1, *et seq.* Jurisdiction was asserted under

Section 301 of the Labor-Management Relations Act of 1947, 29 U. S. C. § 185, and 28 U. S. C. § 1337.

The District Court initially entered an order vacating the award on the grounds that it was "arbitrary and capricious" (App. II, pp. A26 and A31) and that the arbitrator exceeded his contractual authority. (App. II, p. A26) After granting respondents' Motion for Reconsideration and hearing further argument, the District Court in substantially identical one-paragraph orders denied petitioner's motion to vacate and granted respondents' motion to confirm and enforce. (App. II, pp. A33 and A34) An appeal from those orders was timely taken.

The Court of Appeals for the Seventh Circuit, in a two-to-one decision, conceded that a literal reading of the arbitrator's opinion yields the interpretation that the arbitrator made two distinct determinations regarding the existence of "just cause": one for September 14, 1973, when the petitioner acted, and one for October 6, 1975, when the arbitrator finished his hearing. But it dismissed this interpretation as "style over substance", passing off the obvious inconsistencies between the arbitrator's findings and resolution as "mere ambiguities" and characterizing petitioner's demonstration of those inconsistencies as its effort to have the federal courts redetermine the facts. (App. I, pp. A11-A13) Further, it rejected the contention that the arbitrator was "arbitrary and capricious". (App. I, pp. A13-A14)

Judge Moore[1] lodged a strong dissent pointing out that the collective bargaining agreement, pursuant to which the arbitrator purported to derive his authority, expressly provided that it was not intended in any way to infringe or impair petitioner's right to dischrage its employees for just cause. (App. I, p. A15) The grievance procedures in Article II of the Agreement unambiguously provided for limited review of petitioner's right to discharge. So long as there was "just cause" for the discharge, it had to be upheld. (App. I, p. A15)

The agreement did not provide that a redetermination of "just cause" should be made 25 months after the discharge.

1. Second Circuit Judge sitting by designation.

(App. I, p. A15) In Judge Moore's view, the agreement vested the arbitrator with no power to determine whether he would have discharged Seman on September 14, 1973, nor did it empower him to weigh the facts available in October, 1975, to decide what he felt the petitioner should do in the way of fair treatment of Seman. (App. I, p. A16) Rather, the arbitrator was authorized to determine whether, when the petitioner acted on September 14, 1973, it acted with "just cause". (App. I, p. A16) On that issue, the arbitrator's finding was unambiguous. There was "just cause" when the petitioner acted and the arbitrator's finding was amply supported by the evidence. (App. I, p. A17)

Judge Moore concluded that no amount of interpretation by the majority could conceal that the arbitrator's award was grounded on his second, unauthorized finding that as of October 6, 1975, petitioner did not have "just cause" for discharging Seman. (App. I, p. A18) Thus, petitioner was not found to have breached the collective bargaining agreement and yet it was ordered to reinstate Seman. (App. I, p. A18) Without a finding of breach, petitioner's action was proper. Thus, Judge Moore would have held that for the arbitrator to order reinstatement was "inconsistent and irrational". (App. I, p. A18)

REASONS FOR GRANTING THE WRIT

I.

This Court Has Not Provided, But Should, Guidance to the Lower Federal Courts for the Review of Fundamentally Irrational Arbitrators' Decisions as the Decision of the Court of Appeals for the Seventh Circuit Illustrates

Almost seventeen years ago, this Court established a strong national policy favoring the arbitration of labor disputes in the landmark Steelworkers Trilogy.[2] In the third of these cases,

2. *United Steelworkers of America* v. *American Manufacturing Co.*, 363 U. S. 564 (1960); *United Steelworkers of America* v.

(Footnote continued on next page)

United Steelworkers of America v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593 (1960), this Court held that a district court's order enforcing an arbitrator's award should have been affirmed even though the award was ambiguous and the collective bargaining agreement pursuant to which the grievance had been taken had expired.

In the course of its decision, the Court declared that as a concomitant to the strong federal policy favoring arbitration, courts should decline to review the merits of arbitration awards. *Id.*, 363 U. S. at 596. It left open the possibility that lower courts should refuse to enforce awards in certain circumstances. Using language that has been quoted or paraphrased by virtually every federal court considering enforcement of an award since the date of the decision, Mr. Justice Douglas, speaking for the Court, said:

> "Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its *essence* from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award." *Id.*, 363 U. S. at 597 (emphasis added.)

It is the establishment of a judicial standard based upon the "essence" of a collective bargaining agreement that has placed petitioner and others aggrieved by arbitrators' irrational awards in the untenable position of being judicially forced to give up rights that were never given up in the collective bargaining process. It is the vagueness of the "essence" standard that is at the heart of petitioner's plea.

Petitioner's case amply illustrates the vagueness of the "essence" standard and ultimately its unworkability. Petitioner

(Footnote continued from preceding page.)
Warrior & Gulf Navigation Co., 363 U. S. 574 (1960); *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593 (1960).

signed a collective bargaining agreement that provided in its preamble:

> "It is not the purpose of this Agreement in any way to infringe or impair the normal Management rights of the Company except as otherwise expressly provided. Included among the Management rights unaffected are the right to hire and the right to discipline or discharge employees for just cause."

The grievance procedures were set forth in Article II of the Agreement and allowed accelerated arbitration of grievances arising from the discharge of employees. In addition, Section 2.19 provided, *inter alia:*

> ". . . If the Management's action of discharging such employee is reversed, and the employee is reinstated with no disciplinary action being taken in lieu thereof, then the employee will be paid in full for all wages lost as a result of the discharge."

Seman was discharged because he had $30,000 worth of petitioner's property in his basement to which he had no right. The issue presented to the arbitrator was whether Seman was discharged for just cause. The arbitrator's answer was simple and unambiguous.

> "To begin with, the Company on September 14, 1973, had just cause to discharge the Grievant. He admittedly had in his possession Company equipment valued at over $30,000.00, which equipment he had no right to have."

With that, the arbitrator's job was finished. Anything beyond that was neither authorized by the agreement nor the submission of the grievance.

Nevertheless, the arbitrator asked and answered the question that proved determinative of his award:

> "The question with which we must grapple is whether the Company still had just cause at the conclusion of the arbitration hearing."

As to that question, the answer was equally simple and unambiguous:

> "Thus I find that as of October 6, 1975, the Company does not have just cause for discharging the Grievant, although they had just cause from knowledge in their possession on Septemer 14, 1973."

To confirm the date as of which no just cause existed, the arbitrator awarded no back pay to the date of the discharge, despite the unambiguous requirement in Section 2.19 that if petitioner's action were reversed, the employee was "to be paid in full . . . for all wages lost as a result of the discharge."

The arbitrator's decision on its face is irrational. Either petitioner had just cause to discharge Seman when it acted on September 14, 1973, or it did not. Undeniably, as the arbitrator found, possession of $30,000 worth of petitioner's equipment is just cause and "[t]he possession of even a few items of Company property would certainly be grounds for discharge." (App. III, p. A44) If it had just cause when it acted, as the arbitrator unambiguously found, then the redetermination of just cause as of October 6, 1975, was irrelevant to the submission and violative of the retention of management prerogatives in the collective bargaining agreement. The discharge should have been sustained.

If, on the other hand, petitioner did not have just cause on September 14, 1973, then the collective bargaining agreement unambiguously required the payment of back pay to the date of discharge, which the arbitrator declined to award. In either event, the award does not correspond to what the arbitrator found to exist.

Further, the arbitrator's second finding as to just cause is irrational since it is without foundation in reason or fact. It was based on Seman's admittedly unsubstantial allegations that he was the object of a conspiracy to "set him up" apparently perpetrated by local governmental officials. The arbitrator repeatedly acknowledged there was no proof of such a conspiracy. (App. III, pp. A43-A45) He refused to find that a conspiracy had, in fact, existed. (App. III, p. A45)

The arbitrator even acknowledged the absurdity of Seman's allegations that literally tons of material consuming a space of 30′ by 15′ by several feet and requiring 4 to 6 hours to remove could have been secretly deposited in his basement by unknown governmental conspirators, saying:

> ". . . [I]f someone were to 'set up' the Grievant, why would that person or organization go to such extremes? The possession of even a few items of Company property would certainly be grounds for discharge. Why then fill a basement with tons of material? And how was this done, if it were done by someone without the knowledge of the Grievant? Again no answers are forthcoming." (App. III, pp. A44-A45)

Having found just cause to exist on September 14, 1973, rationality would demand that some proven change in circumstances or proven new knowledge would result in just cause not existing on October 6, 1975. None was proven. None was substantiated. The only fact which the arbitrator was able to recite, and which the Court of Appeals adopted, was that the fire in Seman's basement was arson. All other facts were within petitioner's knowledge when it made its determination to discharge on September 14, 1973, and must have been taken into account when the arbitrator found there was just cause on that date. The possession of $30,000 worth of petitioner's equipment was not found to be related to the arson. And an unknown arsonist could not create a right for Seman to possess petitioner's equipment.

The arbitrator's award was irrational. It was sustained by the Court of Appeals, however, because the Court of Appeals had no guidance from this Court on how to deal with irrational awards. Some Courts of Appeals, including the Seventh Circuit, have purported to adopt an "arbitrary and capricious" standard to deal with such awards. *See, e.g., Yellow Cab Co.* v. *Democratic Union Organizing Committee Local 777,* 398 F. 2d 735 (CA 7 1968), *cert. denied,* 393 U. S. 1015 (1969); *Brotherhood of Railroad Trainmen* v. *Central of Georgia Ry.*

Co., 415 F. 2d 403 (CA 5 1969), *cert. denied*, 396 U. S. 1008 (1970). Other courts of appeals have not, relying exclusively on the "essence" standard.

In the twenty-one cases in which the various courts of appeals have considered the "arbitrary and capricious" standard since *Enterprise Wheel*, twenty of them resulted in the award being enforced.[3] The award was not enforced in *Amalgamated Food & Allied Workers Union, Local 56* v. *Great A. & P. Co.*, 415 F. 2d 185 (CA 3 1969). In that case, an arbitration panel by a two-to-one vote had refused to consider the merits of a grievance that just cause did not exist for the discharge of an employee who had allegedly stolen four cans of crab meat. The basis of the decision by the majority of the panel was that the union in a letter had arguably conceded the theft of the cans leaving only the severity of the action taken for review by the panel.

An action to set aside the award was instituted and the district court concluded that the refusal of the arbitration committee to decide the guilt or innocence issue was "arbitrary and capricious". *Id.*, 415 F. 2d at 188. Under the terms of the agreement in that case, the only issue which could be arbitrated was "just cause" or "sufficient cause" for the discharge. Thus, for the arbitrators to have concluded that the issue had been conceded in advance necessarily meant that there was nothing to arbitrate. That conclusion flew in the face of the submission of the issue of just cause by the union and the company, and therefore, amounted to a denial of due process. Accordingly, the controversy was referred back to the arbitrators for a determination on the just cause issue. On appeal, the court of appeals adopted the reasoning of the district court in affirming its action. *Id.*, 415 F. 2d at 189.

The irrationality displayed by the arbitration panel in the *Great A. & P. Co.* case, *supra*, was certainly no more than

3. In the seventy-seven cases considered by the courts of appeals since *Enterprise Wheel* in which the question of enforcement has been raised, sixty-seven have been enforced. The most popular reason for denying enforcement has been that an arbitrator exceeded his authority.

that displayed by an arbitrator who, having concluded the grievance submitted to him, established a new submission to answer, *viz.*, "[T]he question with which we must grapple is whether the Company still had just cause at the conclusion of the arbitration hearing." In each instance, the arbitration proceeded and a conclusion was reached in derogation of the submission. Thus, even in purporting to apply the same standard to deal with irrational decisions, the Third and Seventh Circuits apply it differently.

An employer bargains for an arbitrator's interpretation and application of a collective bargaining agreement. Petitioner has no quarrel with the concept that, in general, an arbitrator's award should not be subject to ordinary judicial review. But occasionally, the result reached by an arbitrator is so irrational that it could neither have been predicted nor bargained for. As to those few cases, the lower federal courts have only vague guidance from this Court based on the word "essence" in *Enterprise Wheel*. The result, with one exception, has been the mandatory recitation of the strong policy favoring arbitration, the admonition that the court must not review the merits, the attempt (in this case extraordinary) to rationalize an irrational award, and the destruction of other bargained for rights.

Largely as a result of the Steelworkers Trilogy, arbitration is increasing as a means of resolution of labor disputes. It will continue to be used and to increase only so long as arbitrators' awards are not fundamentally irrational. If there are no standards established that provide guidelines to lower federal courts in dealing with irrational awards, the national policy favoring arbitration will be undermined by increasing reluctance to turn to arbitrators for the resolution of disputes. Courts would once again become the arbiters of day-to-day labor problems.

Petitioner respectfully prays this Court grant certiorari to review the decision of the Seventh Circuit in order to clarify the application of the "essence" standard adopted in *Enterprise Wheel* to fundamentally irrational arbitrators' awards.

II.

The Decision of the Court of Appeals Redetermines the Merits of the Arbitrator's Findings and Conflicts with Enterprise Wheel and Its Progeny

The one immutable principle to flow from *Enterprise Wheel* is that federal courts should refuse to review the merits of an arbitrator's award. In the instant case, the Court of Appeals had to rewrite the determinations on the merits by the arbitrator in order to rationalize his award. The Court, thus, violated this principle and must be reversed.

The primary issue submitted to the arbitrator was whether there was just cause for Seman's discharge. The arbitrator made two determinations on the merits of this submission. Petitioner had just cause on September 14, 1973, but it did not on October 6, 1975. The Court of Appeals, rather than face up to the realization that out of tens of thousands of arbitration awards occasionally one is going to be fundamentally irrational, chose to merge the two distinct, inconsistent findings of just cause. It stated:

> ". . . [T]he thrust of this opinion is that although the Company acted in compliance with the knowledge in its possession and without unseemly motive in dismissing Seman, such discharge occurred without just cause since the arbitrator remained unpersuaded that Seman was implicated in any wrong-doing which warranted his termination. . . ." (App. I, p. A11)

This "thrust" found by the majority does not coincide with the arbitrator's express and unequivocal findings. The "knowledge in [petitioner's] possession" on September 14, 1973, was expressly found to be just cause. Clearly, the arbitrator could have chosen to find no just cause existed on that date had he been persuaded that was the case. But he did not so find and apparently was not so persuaded. And to assure the rest of the world would not mistake his intention, he repeated his finding of just cause on September 14, 1973, several times.

The Court of Appeals in order to affirm the award had no choice but to rewrite one of the arbitrator's two unequivocal findings on the merits. The fact that that choice had to be made confirms the fundamental irrationality of the award. But the fact that it was made irrefutably establishes that the appellate court redetermined the merits of the arbitrator's first finding that there was just cause for Seman's discharge on September 14, 1973.

To compound its error, the Court of Appeals apparently found Seman should have been disciplined when the arbitrator's order was silent on that subject. If no just cause for Seman's discharge existed, the collective bargaining agreement provided the remedy that back pay to the date of discharge be paid by petitioner. There was no exception provided in the agreement if no disciplinary action were to be taken in lieu of the discharge.

The arbitrator's order was absolutely silent on the appropriateness of disciplinary action. It made no finding relating to such action and ordered none. The award the arbitrator fashioned had no relation to the conduct of Seman and instead was solely based on his dual findings of just cause and no just cause, the absence of petitioner's complicity in the unproven conspiracy and petitioner's good faith. (App. III, p. A45)

Again since this result was wholly inconsistent with the collective bargaining agreement, the Court of Appeals had to substitute its own judgment on the merits of appropriate disciplinary action. So it did, saying:

> ". . . [T]he denial of back pay is analogous to a suspension pending satisfactory explanation of the possession of Company property. We will not substitute our judgment for that of the consensually appointed arbitrator regarding the propriety of this disciplinary measure." (App. I, p. A14)

Again, the fact that this was its choice points up the fundamental irrationality of the award. But the appellate court chose to enter a judgment where the arbitrator had obviously felt it inappropriate.

Redeterminations of the merits of arbitrators' awards and the substitution of the appellate courts' own findings directly conflict with the teachings of *Enterprise Wheel* and decisions of all the circuits, including the Seventh.[4] Petitioner, therefore, respectfully prays this Court grant certiorari to correct the Seventh Circuit's erroneous judgment.

III.

The Court of Appeals' Judgment That the Arbitrator's Award Was an Interpretation and Application of the Agreement Is Erroneous and in Conflict with the Decision of Another Court of Appeals

This Court has authorized limited review of arbitrators' awards recognizing that "an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice." *Enterprise Wheel, supra,* 363 U. S. at 597. Thus, "a court may review and set aside an award if . . . the arbitrator exceeds his contractual authority." *Cannon* v. *Consolidated Freightways Corp.*, 524 F. 2d 290, 295 (CA 7 1975). *See also, International Association of Machinists, District No. 8, AFL-CIO* v. *Campbell Soup Co.*, 406 F. 2d 1223, 1225 (CA 7 1969), *cert. denied,* 396 U. S. 820 (1969); *Torrington Co.* v. *Metal Products Workers Union Local 1645,* 362 F. 2d 677, 680 (CA 2 1966). In the case at bar, the arbitrator exceeded his authority by grounding his award on an issue not submitted to him. The Court of Appeals' decision affirming enforcement of that award therefore conflicts with the decision of this Court in *Enterprise Wheel* and of the Sixth Circuit in *Magnavox Company of Tenn.* v. *International U. of E., R. & M. W.*, 410 F. 2d 388 (CA 6 1969).

The arbitrator was vested by the collective bargaining agreement with the authority to determine whether the petitioner had

4. See, *e.g., International Association of Machinists, District No. 8, AFL-CIO* v. *Campbell Soup Co.*, 406 F. 2d 1223 (CA 7 1969), *cert. denied,* 396 U. S. 820 (1969); *Gulf States Telephone Company* v. *Local 1692, International Brotherhood of Electrical Workers, AFL-CIO,* 416 F. 2d 198, 201 (CA 5 1969).

just cause when it discharged Seman on September 14, 1973. The answer the arbitrator reached was undeniably yes. He even stated his ground, "[Seman] admittedly had in his *possession* Company equipment valued at over $30,000.00, which equipment he had no right to have." (App. III, p. A42) (Emphasis added.) That this was sufficient just cause for a discharge was emphasized by the arbitrator when he stated, "The *possession* of even a few items of Company property would certainly be grounds for discharge." (App. III, p. A44) (Emphasis added.) And, of course, the arbitrator repeated in the course of his opinion that petitioner had just cause when it acted.

Under the terms of the collective bargaining agreement and the submission of the grievance, that ended the inquiry. The arbitrator certainly was not authorized by either the agreement or the submission to determine what he would have done on September 14, 1973, although his opinion indicates he would have discharged Seman. Nor was he authorized by the agreement or the submission to weigh the facts available on October 6, 1975, to decide what he felt petitioner should do to be fair to its former employee. Yet it was his determination on this issue that led to his award.

Disregarding the substantive accuracy of either of the arbitrator's conclusions, the fact is that by reaching his first conclusion—there was just cause when petitioner acted—he had expended his mandate. The second conclusion—just cause did not exist on October 6, 1975—was irrelevant to the submission. As Judge Moore aptly stated in his dissent:

> "No amount of interpretation by the majority, no mitigating judicial reformulation of the 'thrust' of the arbitrator's decision, can conceal or explain away the fact that the award was grounded on this second, unauthorized finding that 'as of October 6, 1975, the Company does not have have just cause for discharging the Grievant. . . .'" (App. I, p. A18)

In making his second determination and grounding his award on it, the arbitrator was "dispensing his own brand of industrial

justice." And the Court of Appeals erred in affirming enforcement of his order. See *Enterprise Wheel, supra,* 363 U. S. at 597.

In *Magnavox Company of Tenn.* v. *International U. of E., R. & M. W., supra,* 410 F. 2d 388, the court of appeals refused to enforce an award entered by an arbitrator who had similarly exceeded the scope of his authority. There, as here, there was a provision in the collective bargaining agreement expressly reserving the company's right to discharge. An employee had been off for some time for health reasons. When he returned, he presented his doctor's certificate that he could return to work but not at any place where he would be exposed to intense heat. Since his regular job called for exposure to heat, the company refused to provide him with a job in which he would be relieved of that work.

The employee then obtained and presented a second certificate in which his doctor stated he could return to his old job without qualification. The company's doctor, after an examination, concurred with that advice. The employee returned to work, but refused his foreman's direction that he perform part of his regular work asserting that he had a doctor's statement that he was not to be in any intensive heat or do any bending over. For this refusal, he was discharged.

The matter went to arbitration under a contractual provision restricting the arbitrator's right to enter any award with respect to disclipinary action imposed upon an employee for refusal to perform assigned job tasks, except where the employee could establish that the performance of the task would have created a serious health hazard to him. The arbitrator found as a fact that the performance of the task the employee refused to perform did not create a hazard to his health.

The arbitrator then went on to find that the discharged employee had good faith doubts as to the health hazard involved in his job. He concluded, therefore, that mitigation of the discipline was warranted and made his award accordingly.

The court of appeals affirmed the district court's order vacating the award in a per curiam opinion with Judge Edwards dissenting. The sole issue on which the court based its holding was that the arbitrator had exceeded his authority under the contract.

The decision of the Court of Appeals in the instant case conflicts with *Magnavox Company of Tenn.* v. *International U. of E., R. & M. W., supra.* In each case, the arbitrator made a finding of fact which completely expended his mandate under the collective bargaining agreement. In each case that finding supported the company's action. In each case, the arbitrator asked and answered a second question not authorized by the submission. In each case, an award was made mitigating the action taken by the company and in derogation of reserved management prerogatives. In each case, the arbitrator exceeded his authority.

Petitioner respectfully prays this Court grant its petition for certiorari to review the Seventh Circuit's decision and to resolve the conflict between that decision, and the decisions in *Enterprise Wheel, supra,* and in *Magnavox Company of Tenn., supra.*

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX I.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 76-1507

AMOCO OIL COMPANY,

Plaintiff-Appellant,

vs.

OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, LOCAL 7-1, INC. and PAUL A. SEMAN,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division
No. H 75-243—Allen Sharp, *Judge*

Argued October 29, 1976—Decided January 24, 1977

Before HASTINGS, *Senior Circuit Judge*, MOORE, *Senior Circuit Judge*,* and SPRECHER, *Circuit Judge*.

SPRECHER, *Circuit Judge*. This case involves the narrow questions of whether the arbitrator exceeded the authority accorded him under the collective bargaining agreement and whether the award rendered reinstating the grievant with full seniority rights but without back pay is so arbitrary and capricious as to warrant denial of enforcement by this court.

* Senior Circuit Judge Leonard P. Moore of the United States Court of Appeals for the Second Circuit is sitting by designation.

We resolve both questions in favor of appellees and order enforcement of the award in all respects.

I

The peculiar circumstances which give rise to this case must be set forth in detail. Appellee Seman, the grievant in this matter, has been employed by appellant Amoco Oil Company (hereinafter referred to as the "Company") for more than three decades. The record indicates that Seman maintained throughout his life an extraordinarily active interest in civic affairs, often inciting controversy through his vocal opposition to governmental decisions and actions which he deemed not in the public interest. In the words of the arbitrator, Seman remained "active in civic affairs, pollution, and school affairs, had been active in suits against the Company and the City Administration, had taken pictures of Company facilities (indicating violation of anti-pollution laws, and ordinances), disrupted City meetings, delayed City projects, was an outspoken critic of City Administration, and was getting in everyone's hair and causing problems." App. at 8. He had instituted litigation against the City and against the Company, had been arrested at the order of the Mayor and won a dismissal of charges, and "in general had driven the City Administration of Whiting to the point of distraction." *Id.*

On September 11, 1973 at 11:00 p.m., while Seman was at home with his wife, son and two guests, members of the Whiting Fire Department arrived at his residence in response to a "fire in progress" call. A small fire in Seman's basement was extinguished. Although the Chief of the Whiting Fire Department is customarily summoned only to witness a conflagration of some magnitude, the Chief was called for assistance in this instance by the fire captain on the scene. The Chief arrived soon thereafter, accompanied by a photographer and a Captain of Detectives. The firemen observed equipment with Amoco markings branded thereon in the basement.

On the following day, September 12, 1973, approximately 10:00 a.m., fire and police investigators returned to the scene of the fire to photograph the basement, which contained many items of equipment clearly designated as the property of Amoco. The Company was notified of the discovery of its equipment in Seman's basement, and the house was placed under surveillance by the Whiting Police Department in order to prevent unobserved removal of the Amoco material prior to the initiation of further action.

On September 13, 1973, at approximately 6:00 p.m., police, accompanied by Company officials, served a search warrant upon Seman and began the task of removing the Company equipment and loading it onto flat bed trucks. Between four to six hours was required to complete this chore. Approximately $30,000 worth of equipment was removed, including 43 chain lifts, seven chipping guns, 11 ladders, and three jackhammers; the items removed occupied space in a warehouse which measured approximately 30′ x 15′, and were stacked several feet high. Spectators to this removal process included virtually every member of the Whiting City Government, such as the City Judge, the City Attorney, the City Engineer, six of the seven Councilmen, and the Mayor. The carnival atmosphere surrounding this spectacle was enhanced when wives and secretaries of the aforementioned city officials set up a table and proceeded to dispense coffee and doughnuts to the audience. Seman was absolved of any criminal taint as a result of the discovery of $30,000 worth of Amoco equipment in his home.[1] A private fire investigator hired by an insurance company determined after investigation that the fire was ignited in two distinct locations in the basement with petrochemical incendiary devices, and involved a clear case of arson.[2]

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1. Criminal charges were dismissed after the search warrant issued on September 13, 1973 was quashed and the evidence gleaned thereunder suppressed.

2. The fire investigator testified at the subsequent arbitration proceeding that he had examined more than 1200 fire scenes,

(Footnote continued on next page)

On September 14, 1973, the Company discharged Seman. A grievance filed on his behalf was processed to arbitration before an impartial arbitrator selected by the parties, pursuant to the collective bargaining agreement between the Company and Oil, Chemical and Atomic Workers International Union, Local 7-1, Inc. (hereinafter referred to as the "Union"). The agreement delineated the rights retained by the Company as follows:

> It is not the purpose of this Agreement in any way to infringe or impair the normal Management rights of the Company except as otherwise expressly provided. Included among the Management rights unaffected are the right to hire and the right to discipline or discharge employees for just cause.[3]

(Footnote continued from preceding page.)

and was unequivocally convinced that arson was the cause of the fire in Seman's basement. Interestingly, however, Whiting city investigators remained unable to determine the cause of the blaze.

3. Pertinent provisions of Company policy regarding cause for discharge are stated as follows:

> In accordance with its past policy, the Company is posting herewith a list of the offenses for which an employee may be suspended or discharged without further notice. This is done in order that all employees may be informed fully as to the offenses for which suspensions or discharges may be made. There is also appended a statement concerning the issuing of written notices for offenses other than those shown in the list.
>
> *Offenses for Which an Employee May Be Suspended or Discharged Without Further Notice*
>
> 1. Violation of any law. Special attention is called to the following:
>
> (a) Carrying concealed weapons; fighting or attempting bodily injury to another; drunkenness; conduct which violates the common decency or morality of the community.
>
> (b) Stealing, or malicious mischief resulting in the injury or destruction of property of other employees or of the Company.
>
> (c) Cruelty to animals which are the property of other employees or of the Company.
>
> * * * * *

(Footnote continued on next page)

App. at 2. The authority conferred upon the arbitrator during the arbitration of grievances is expressed in the following language:

> The arbitrator articulated the salient question as follows:
>
> > Was the Grievant, Paul Seaman [sic] discharged for just cause? If not, what is the remedy?

The defendants assumed the position throughout the course of the arbitration hearing that no just cause for Seman's discharge existed, because his possession of Company property resulted not from wrongful conduct on his part which might justify termination of his employment, but rather was a stratagem of a group of unknown conspirators who sought to incite his discharge. To buttress this contention, defendants stressed Seman's role as the self-appointed community conservator of citizens' interests, a role which earned him the opprobrium of city officials. Further, defendants maintained that the bizarre sequence of circumstances surrounding the discovery of the Company equipment[4] pointed inexorably to the conclusion that

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(Footnote continued from preceding page.)

7. The possession of or exercise by any employee of any habits, demeanor, characteristics, action or course of action that makes him objectionable to other employees or the management or that makes his retention in the service disruptive of a spirit of harmony therein or would cause other employees to leave the service.

* * * * *

Notices in Writing for Other Offenses

For offenses other than those listed above, an employee shall not be suspended or discharged without first having been notified in writing that a repetition of the offense will make him liable to suspension or discharge.

App. at 12-13.

4. The Union argued that, given the unequivocal conclusion that the fire resulted from arson, Seman would not have ignited the blaze while his wife, son and two guests occupied the house, and would not have wittingly summoned the fire department had he been aware of the presence of the Amoco equipment. The arrival of the Fire Chief, a Captain of Detectives and a photographer was

(Footnote continued on next page)

a group of unidentified conspirators had schemed to finally "get the Grievant out of the hair of the City." App. at 11.

The Company countered these assertions by reiterating that Amoco property had been unauthorizedly possessed by Seman, and urging that the Union's mere allegations of conspiracy did not constitute proof that this material had been secreted in Seman's home without his consent or knowledge.

After reviewing the factual background and the contentions of the parties, the arbitrator initiated his discussion of the case with the observation that:

> To begin with, the Company on September 14, 1973, had just cause to discharge the Grievant. He admittedly had in his possession Company equipment valued at over $30,000, which equipment he had no right to have. The question with which we must grapple is whether the Company still had just cause at the conclusion of the arbitration hearing. As will be shown, it is the finding that the Company did not ultimately have just cause to discharge the Grievant.

App. at 13-14.

In a well-reasoned opinion, the arbitrator catalogued those points he deem supportive of Seman's allegation that the Amoco material found in his basement was deliberately secreted there by persons unknown, and that this placement reflected a conspiracy by these persons to provoke his discharge. Conceding

(Footnote continued from preceding page.)
cited as further indication of conspiracy, for the presence of these individuals was admittedly disproportionate to the magnitude of the small domestic fire involved. The inference to be drawn, posited defendants, was that these persons "were aware that Amoco equipment would be found at the scene of the fire." App. at 11, and desired to thoroughly document the occasion. The carnival atmosphere pervading the execution of the search warrant, with virtually the entire city government participating as gleeful spectators munching doughnuts, is pointed to as indicative of the possibility that a conspiracy to instigate Seman's termination by the Company existed.

It must be noted, however, that the Union does not contend that the Company participated in or was cognizant of a conspiracy directed toward Seman.

that Seman was "not an ordinary man" either in the civic and moral values he espoused or in the elements of his individual life style, the arbitrator commented that:

> He evidenced an extraordinary contempt for the *indicia* of success common to most: he did not drive nor own a car, dressed in a most odd manner, and patently held the opinion that most people had of him in complete contempt. His life style was also different; few of us keep our refrigerators in our dining rooms, and have to eat standing up because there is no room to sit down. From the photographs admitted in the Hearing, he had an extraordinary tolerance for disorder in his home, to the point where he was unable to promptly differentiate between his kitchen and his dining room when photographs of one was shown to him, in fact, initially misidentifying the room. The condition of his basement storage can be generously described as chaotic.

App. at 14.

Seman's unusual social concern, manifested as a propensity toward litigiousness, was viewed as a basis for "motive on the part of numberless groups" to conspire in the hopes of gaining some measure of revenge against him. Further, the arbitrator could discern neither a mode of transporting the thousands of pounds of material to his home,[5] nor a motive for Seman, given his demonstrated lack of acquisitiveness, to steal heavy equipment of questionable utility which was readily identifiable as the property of the Company.[6]

The arbitrator also focused upon the highly peculiar conduct of the city officials in determining that Seman's allegations

5. Seman neither owned a car nor had a driver's license and commuted to his job via bicycle. App. at 16.

6. Seman's cognizance of his vulnerability to charges of moral inadequacy by those he constantly challenged is demonstrated in his testimony that:

> [H]e was aware that he had to be "purer than Caesar's wife" because he was daily flying in the face of the power structure, and was susceptible to being discredited if he fell below the highest plane of moral conduct.

App. at 16.

of conspiracy were not groundless. The unusual and rapid assembly of fire and police officials at the scene of a small fire, the failure of city inspectors to determine the cause of the fire, despite the unequivocal conclusion of a private investigator that arson was involved, the exaggerated carnival activity participated in by virtually every city government official impelled the arbitrator to remark:

> The fact that there was glee at the fact that the "gadfly" had hopefully had his stinger pulled, was not surprising, but the extent and expressions of that glee have to lend a touch of credence to the charges of the Grievant. Would a Government which reacted so cheerfully at the downfall of an opponent also do anything to create that downfall?

App. at 15.

The arbitrator recognized, however, that the unusual circumstances of this case held troubling questions even if conspiracy were a proven fact. In his words:

> [I]f someone were to "set up" the Grievant, why would that person or organization go to such extremes? The possession of even a few items of Company property would certainly be grounds for discharge. Why then fill a basement with tons of material? And how was this done, if it were done by someone without the knowledge of the Grievant?

App. at 16-17.

The conclusion of the arbitrator's opinion reveals his resolution of the questions arising from this perplexing maze of occurrences, particularly the critical question of how the Company found its way into Seman's home.

> The grievant alleges conspiracy, but has not proved it. Most frankly, however, he has raised enough doubts so that I believe the level of proof of his complicity in the possession of the Company property does not reach that required to sustain his discharge.
>
> Thus, I find that as of October 6, 1975, the Company does not have just cause for discharging the Grievant, although they had just cause from the knowledge in their possession on September 14, 1973.

> What is the Company liability for their actions of September 14? The Grievant has admitted, and I agree with him, that he has no proof whatsoever of any Company involvement in any conspiracy. If an outside group conspired to "set up" the Grievant so that he would be discharged, then the Grievant's remedy for his damages must be against that group, not against the Company, who acted with just cause when they acted.

App. at 17.

In allowing the grievance, the arbitrator ordered that Seman be promptly reinstated to employment with no forfeiture of seniority, but without back pay.

The district court vacated this award, termed "arbitrary" and "capricious" in an unpublished order dated January 30, 1976. However, on February 26, 1976, the district court granted defendants' motion to reconsider, set aside its previous order, and requested further briefing and oral argument on the matter.[7] On April 13, 1976, the district court determined that judicial interference in this award was improper, and ordered its enforcement, stating:

> A district court must suppress any tendency to replace its evaluation of the facts for that of the chosen arbitrator. In this case that temptation is great. Very reluctantly, this Court has determined that these well established rules require it to refrain from upsetting this award.

App. at 44.

Plaintiff appeals from this decision.

II

Plaintiff-appellant challenges the award in this court on two bases: first, that the arbitrator exceeded his contractual authority in allowing the grievance, and second, that the award is

7. The court stated that language in two recent opinions by this Court, *United Electrical Radio & Machine Workers of America* v. *Honeywell*, 522 F. 2d 1221 (7th Cir. 1975) and *International Union of Operating Engineers, Local 139* v. *Morse, Inc.*, 529 F. 2d 574 (7th Cir. 1976), underlay the decision to reconsider the earlier ruling issued in the instant case.

"arbitrary" and "capricious" because not grounded in reason or fact, and therefore does not merit enforcement.

We begin by reiterating that national policy, as articulated in the Steelworkers trilogy,[8] favoring the orderly resolution of grievances through arbitration where the parties have agreed contractually to be bound by the arbitrator's determination, severely circumscribes the role of a reviewing court. The scope of judicial inquiry, precluded from entertaining a review of the merits of an arbitral award, is confined to the narrow questions of whether the award "draws its essence from the collective bargaining agreement" and whether "the arbitrator's words manifest an infidelity to this obligation." *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593, 597 (1960). An arbitrator's award does "draw its essence from the collective bargaining agreement" so long as the interpretation can in some rational manner be derived from the agreement, "viewed in the light of its language, its context, and any other indicia of the parties' intention; only where there is a manifest disregard of the agreement, totally unsupported by principles of contract construction and the law of the shop, may a reviewing court disturb the award." *Ludwig Honold Manufacturing Co.* v. *Fletcher*, 405 F. 2d 1123, 1128 (3d Cir. 1969). *See also International Union of District 50, United Mine Workers of America* v. *Bowman Transportation, Inc.* 421 F. 2d 934, 935 (5th Cir. 1970); *Torrington Company* v. *Metal Products Workers Union, Local 1645*, 362 F. 2d 677, 682 (2d Cir. 1966) (Feinberg, J., dissenting). Neither the correctness of the arbitrator's conclusion nor the propriety of his reasoning is relevant to a reviewing court, so long as his award complies with the aforementioned standards to be applied by the reviewing court in exercising its limited function. *Ludwig Honold, supra*, at 1132.

8. *United Steelworkers of America* v. *American Manufacturing Co.*, 363 U. S. 564 (1960); *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574 (1960); *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593 (1960).

With these general principles in mind, we address the Company's specific arguments.

A

Plaintiff-appellant's contention that the arbitrator exceeded the authority accorded him in the collective bargaining agreement stems from its characterization of the arbitrator's resolution as two distinct determinations regarding the existence of just cause. The Company contends that under the contract the arbitrator derives authority solely to review the Company's decision to discharge, and in this case the arbitrator did so, determining that just cause supporting the Company's action existed on September 14, 1973. The alleged arbitral misfeasance occurred in the arbitrator's unwarranted independent pronouncement that just cause no longer existed at the time the arbitral ruling was rendered, some 25 months later. While a superficial and literal reading of the arbitrator's opinion might yield that interpretation, such a literal characterization serves to elevate style over substance. In finding that "the Company did not *ultimately* have just cause to discharge the Grievant," App. at 14 (emphasis added), the arbitrator declared:

> Thus, I find that as of October 6, 1975, the Company does not have just cause for discharging the Grievant, although they had just cause *from the knowledge in their possession* on September 14, 1973.

App. at 17 (Emphasis added).

Thus, the thrust of this opinion is that although the Company acted in compliance with the knowledge in its possession and without unseemly motive in dismissing Seman, such discharge occurred without just cause since the arbitrator remained unpersuaded that Seman was implicated in any wrong-doing which warranted his termination, according to the contract. The Company's good faith cannot substitute for the just cause requirement. *Rheem Automotive Company*, 27 Lab. Arb. 863, 866 (1956). The salient issue, whether just cause supported the Company's decision, albeit made in good faith, was resolved

adversely to the Company. This judgment is within the sphere of arbitral authority contemplated by the parties' contract, which accords the arbitrator the authority to review Company determinations regarding just cause, and therefore must be enforced by this court.

We reiterate, in so holding, two admonitions which well serve to guide reviewing courts in the resolution of similar claims regarding the wielding of excessive authority by an arbitrator. First, the Supreme Court has declared that the fact that an arbitrator's opinion is susceptible of varying interpretations is of no moment in the determination of the validity of the accompanying award.

> A mere ambiguity in the opinion accompanying an award, which permits the inference that the arbitrator may have exceeded his authority, is not a reason for refusing to enforce the award. Arbitrators have no obligation to the court to give their reasons for an award. To require opinions free of ambiguity may lead arbitrators to play it safe by writing no supporting opinions. This would be undesirable for a well-reasoned opinion tends to engender confidence in the integrity of the process and aids in clarifying the underlying agreement.

Enterprise Wheel, supra, at 598.

Second, the Fifth Circuit has cautioned against use of the "authority" argument as a ruse to induce the reviewing court to "redetermine the facts—even just a tiny bit—or reach a legal conclusion on them as found or hoped for which differs from that of the consensually annointed [sic] judge." *Gulf States Telephone Company* v. *Local 1692, International Brotherhood of Electrical Workers, AFL-CIO,* 416 F. 2d 198, 201 (5th Cir. 1969). *See also Dallas Typographical Union 173* v. *A. H. Belo Corp.,* 372 F. 2d 577, 583 (5th Cir. 1967).

Here, the arbitrator was empowered to review the propriety of a discharge under a "just cause" standard. His view of the circumstances surrounding the termination led him to conclude that just cause did not exist. His award, therefore, "draws its

essence from the collective bargaining agreement" and does not "manifest an infidelity to this agreement." *Enterprise Wheel, supra,* at 597. Our inquiry goes no further.

B

The Company's contention that the award is unenforceable because arbitrary, capricious, and without foundation in reason or fact is premised upon the assertion that the existence of a conspiracy was not conclusively proven, and is not a "fact" which can form a rationally inferable basis for the award. The Company decision to terminate Seman was grounded solely in acceptance of the negative inferences arising from his unauthorized possession of Amoco property. However, the inferences drawn from circumstantial evidence may be rebutted or explained, and the weight to be accorded both the inferences and the contradictory explanations is a matter solely within the arbitral sphere.

Here, the arbitrator noted the undisputed fact that Amoco equipment was found in Seman's basement. The inference of theft by Seman arising from this unauthorized possession was countered by a number of pertinent observations, although the arbitrator could not conclusively find the existence of a conspiracy to "set up" Seman. The arbitrator emphasized the long and heretofore successful employment of Seman; his demonstrably high moral standards, integrity, lack of acquisitiveness, and civic concern; the state of chaos prevailing in his home, which lends credence to the notion that tons of heavy equipment might remain undetected by the dwellers of the premises; his lack of access to a motor vehicle with which to transport the material to his home; and the bizarre conduct of city officials in summoning important persons to witness a relatively insignificant fire, in failing to detect an apparently obvious case of arson in the igniting of that fire, and in exaggerated manifestations of unabashed glee during the execution of the search war-

rant. An aggregation of the foregoing considerations impelled the arbitrator to conclude that "the level of proof of [Seman's] complicity in the possession of the Company property does not reach that required to sustain his discharge." App. at 17. We cannot hold his judgment, based upon articulated considerations, arbitrary or capricious.

Moreover, the determination that Seman was entitled to reinstatement without forfeiture of his seniority, but with denial of back pay evidences neither arbitrariness nor inconsistency. The contract requires payment of back pay to an employee discharged without just cause only if reinstatement is ordered with no disciplinary action taken in lieu of discharge, leaving the arbitrator free to mete out discipline where deemed appropriate. *Cf. Enterprise Wheel, supra,* at 597. Since the Company action in discharging Seman on September 14, 1973, upon its discovery of Amoco property unauthorizedly in his possession, was determined to be a good faith response, the denial of back pay is analogous to a suspension pending satisfactory explanation of the possession of Company property. We will not substitute our judgment for that of the consensually appointed arbitrator regarding the propriety of this disciplinary measure. *Enterprise Wheel, supra; International Union of District 50, United Mine Workers of America* v. *Bowman Transportation, Inc.*, 421 F. 2d 934 (5th Cir. 1970); *International Association of Machinists, District No. 8, AFL-CIO* v. *Campbell Soup Co.*, 406 F. 2d 1223 (7th Cir.), *cert. denied,* 396 U. S. 820 (1969); *Gulf States, supra; Yellow Cab Company* v. *Democratic Union Organizing Committee, Local 777, S. I. U. N. A., AFL-CIO,* 398 F. 2d 735 (7th Cir. 1968), *cert. denied,* 393 U. S. 1015 (1969).

III

Defendants-appellees claim an entitlement to attorneys' fees and costs of suit, contending that the Company's challenge of the award is totally without justification. We cannot hold that the Company's position is so wholly devoid of merit as to warrant

the imposition of costs and fees, particularly in view of the fact that the district court initially upheld the validity of the Company's contentions. *Local 149 International Union, United Automobile, Aircraft & Agricultural Implement Workers of America* v. *American Brake Shoe Co.*, 298 F. 2d 212 (4th Cir.), *cert. denied,* 369 U. S. 873 (1962).

Accordingly, attorneys' fees and costs of suit are denied. The award of the arbitrator is, in all respects,

ENFORCED.

MOORE, *Circuit Judge,* (Dissenting): I dissent from the majority's enforcement of this arbitration award because the arbitrator's decision is inconsistent and irrational and exceeds the contractual authority accorded the arbitrator by the collective bargaining agreement.

The arbitrator derives his authority solely from the collective bargaining agreement between the Amoco Oil Company, Whiting Refinery ("Company"), and the Oil, Chemical and Atomic Workers International Union, Local 7-1, Inc. ("Union"), so any action taken by him in derogation of the agreement must be null and void. The agreement expressly provides in the Preamble that it does not intend "in any way to infringe or impair" Managements "right to . . . *discharge employees for just cause.*" (Emphasis added).

The grievance procedures established in Article II of the bargaining agreement, including arbitration, complement Management's prerogative by unambiguously providing for only a limited review of the Company's decision to discharge: if the Company had "just cause" for the discharge, its action must be upheld. The grievance procedures do not empower an arbitrator to second-guess Management as to what course of action should fairly be taken almost two years after the events of which a grievant complains. As the Supreme Court stated in *United Steelworkers* v. *Enterprise Wheel and Car Corp.*, 363 U. S. 593 (1960), in setting forth the standard for judicial review of industrial arbitration awards:

> When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of the problem. . . . *Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice.* He may of course look for guidance from many sources, yet *his award is legitimate only so long as it draws its essence from the collective bargaining agreement.* When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award. 363 U. S. at 597 (Emphasis added).

This court endorsed these guidelines most recently in *Cannon* v. *Consolidated Freightways Corp.*, 524 F. 2d 290, 295 (1975), where it explained that

> [o]f course, a court may review and set aside an award if . . . the arbitrator exceeds his contractual authority.

See also International Ass'n of Machinists, Dist. No. 8 v. *Campbell Soup Company*, 406 F. 2d 1223, 1225 (7th Cir.), *cert. denied*, 396 U. S. 820 (1969); *Torrington Co.* v. *Metal Products Workers Union Local 1645*, 362 F. 2d 677, 680 (2d Cir. 1966).

Pursuant to the Company-Union bargaining agreement, this arbitrator was empowered only to make a finding on the single issue of whether or not the Company had acted with "just cause" in discharging Seman on September 14, 1973. The agreement vested no authority in the arbitrator to make his own determination as to whether *he* would have discharged Seman in 1973 or at any other time. Nor did the agreement authorize the arbitrator to weigh the "facts" available in October, 1975 to decide what *he* felt the company should do in the way of fair treatment of its former employee. Yet these unauthorized determinations, which in no way draw their "essence" from the collective bargaining agreement, are precisely those from which the arbitrator derived his award.

The arbitrator expressly found in the first sentence of his analysis, and repeated in similar words later in his opinion, that in fact "the Company on September 14, 1973, had just cause to discharge the Grievant [Seman]." This conclusion was amply supported by the arbitrator's findings of fact. Company policy had long made theft of company property a ground for discharge. Seman, admittedly without authorization, had over $30,000 worth of the Company's heavy industrial equipment in the basement of his home on September 11, 1973, and he offered no plausible explanation as to how it came to be there. His only response was to allege, without any factual support, that some unidentified persons must have conspired to "plant" the equipment in his basement. Troubling issues, such as how this could be accomplished without his knowledge, and why his adversaries would stockpile several tons of contraband when a mere jackhammer would have sufficed, he left unanswered. As the arbitrator found, the damaging inference of the unauthorized possession of company property provided ample "just cause" for the discharge, establishing that the Company acted entirely within its contractual right.

The substantive accuracy of this conclusion of the arbitrator is not the focus of our inquiry. Rather, the conclusion is significant because it demonstrates that with his express finding that the Company had acted properly in 1973, he fully expended his mandate under the collective bargaining agreement. With that finding he had completed the performance of his duties, and his investigation should then have terminated. Yet, he went beyond reviewing the authority for the Company's decision, reasoning that *as of October 6, 1975*, "just cause" for discharge *no longer existed*. But Seman's conduct as of October 6, 1975 was completely irrelevant to the issue of the propriety of his discharge, for it was only the September, 1973 discoveries upon which the discharge in issue was based. This second conclusion is quite obviously a separate finding regarding the existence of "just cause", unrelated to the first finding and wholly dehors

the arbitrator's scope of authority. It shows a "manifest disregard" or the bargaining agreement and in itself requires vacatur of the award.

No amount of interpretation, by the majority, no mitigating judicial reformulation of the "thrust" of the arbitrator's decision, can conceal or explain away the fact that the award was grounded on this second, unauthorized finding that "as of October 6, 1975, the Company does not have just cause for discharging the Grievant [Seman]. . . ." To recognize that the award was so grounded does not, as the majority suggest, "elevate style over substance"; it simply admits the literal existence of two distinct findings relative to "just cause." In making the second determination, the arbitrator placed himself in the role of management and ignored the fact that his authority was limited to interpreting and applying the collective bargaining agreement. In other words, he began to "dispense his own brand of industrial justice", something he is prohibited from doing.

As a result of the arbitrator's unauthorized veto of a managerial decision protected by the collective bargaining agreement, the Company was ordered to reinstate Seman even though it had not been found to have breached the bargaining agreement by discharging him. Yet, without a finding of breach the discharge of Seman can only be deemed entirely proper. The decision of the arbitrator is thus inconsistent and irrational, and even extensive rewriting of it by this court cannot make it properly enforceable.

Accordingly, I would vacate the award.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

OPINION BY JUDGE SPRECHER
(Judge Moore dissenting*)

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

January 24, 1977

Before

HON. JOHN S. HASTINGS, *Senior Circuit Judge*
HON. LEONARD P. MOORE, *Senior Circuit Judge**
HON. ROBERT A. SPRECHER, *Circuit Judge*

AMOCO OIL COMPANY,
Plaintiff-Appellant,

No. 76-1507

vs.

OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, LOCAL 7-1, INC., AND PAUL A. SEMAN,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

No. Civ. H 75-243

Allen Sharp,
Judge

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Indiana, Hammond Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the award of the arbitrator in this cause be, and the same is hereby, enforced in all respects, in accordance with the opinion of this court filed this date. Defendants' claim for costs and attorneys' fees is denied. Each party to bear its own costs.

* Honorable Leonard P. Moore, Senior Judge, United States Court of Appeals for the Second Circuit, sitting by designation.

APPENDIX II

UNITED STATES DISTRICT COURT

* * (Caption—H 75-243) * *

ORDER

This case was filed on October 29, 1975 by the plaintiff, Amoco Oil Company, by filing of Motion for Order Vacating Award of Arbitration. On November 10, 1975 the defendants filed answer to Motion for Order Vacating Award of Arbitration including a memorandum of authorities. On December 9, 1975 the defendants filed Cross Motion for Order Confirming and Enforcing Award of Arbitration. On January 19, 1976 the defendants filed brief in support of Motion for Order Vacating Award of Arbitration and in response to Cross Motion for Order Confirming and Enforcing Award of Arbitration.

It appears from the record that this case can now be decided on the basis of the pleadings and papers now before the Court.

On October 6, 1975, Arbitrator James P. Martin (hereinafter called the "Arbitrator") issued his Decision and Award (hereinafter called the "Arbitrator's Award") in FMCS case No. 75K/06635. The grievant in that case was Paul Seman and the issue before the Arbitrator was:

> "Was the Grievant, Paul Seaman [sic], discharged for just cause? If not, what is the remedy?"

Seman's grievance was processed to arbitration under the terms of a collective bargaining agreement between Amoco Oil Company (hereinafter called "Amoco") and Oil, Chemical and Atomic Workers International Union, Local 7-1, Inc. This collective bargaining agreement provided:

> " 'It is not the purpose of this Agreement in any way to infringe or impair the normal Management rights of the Company except as otherwise expressly provided. Included among the Management rights unaffected are the right to hire and the right to discipline or discharge employees for just cause.' " (Arbitrator's Award at 7.)

The facts, which led to Paul Seman's discarge by Amoco, were found by the Arbitrator to be as follows:

> "At 11:00 p.m. on September 11, 1973, the Whiting Fire Department answered a 'fire in progress' call to the Grievant's home. In battling the blaze in the Grievant's basement, fire department personnel noted equipment with AMOCO markings on them. The fire was eventually put out. The following morning at approximately 10:00 a.m., fire and police investigators reviewed the situation in the Grievant's basement and took many photographs of the basement and its contents. Seen in photographs were many items of equipment which belonged to AMOCO. This fact was not disputed by the Grievant. The record was replete with evidence of Company equipment being in the Grievant's basement, and since there was no denial that the equipment was there, it is taken as true.
>
> "The following day, September 12, shortly before 5:00 p.m., the Whiting Police Department placed the Grievant's residence under surveillance, since the Company had been informed of their equipment being in the Grievant's basement, and the police wished to prevent the unobserved removal of any of this equipment prior to action being taken. That action was taken on the following day, September 13, in the form of a search warrant. Shortly before 6:00 p.m., Whiting Police, accompanied by Company officials, served the search warrant and began to remove equipment belonging to the Company from the Grievant's basement. Approximately $30,000.00 worth of equipment was removed, including items such as the following:
>
> | | |
> |---|---|
> | 43 Chain Lifts | 7 Chipping Guns |
> | 11 Ladders | 3 Jackhammers |
>
> "The equipment covered space in a warehouse which probably measured 30′ x 15′, stacked up to several feet high. It took 4 to 6 hours to finish removing all of the equipment from the Grievant's basement and loading it on

flat bed trucks. This ran until late in the evening, and during the time of the removal of the equipment, practically the entire City Government turned out to watch the activities. Unrebutted testimony revealed that practically the entire City Government was in attendance, including the City Judge, the City Attorney, the City Engineer, six out of seven Councilmen and the Mayor, among others. Evidence further showed that a table was set up and coffee and doughnuts were being dispensed by several wives and secretaries of the above.

* * * * *

"Testimony revealed that many of the items in the basement of the Grievant's home, belonging to AMOCO, were too heavy for one man to lift and required two men to drag them across the floor and remove them from the basement. Further unrebutted testimony revealed that the Grievant did not drive, did not own a car, and was always seen going to and coming from work on a bicycle." (Arbitrator's Award at 2-4.)

Based upon the above facts, the Arbitrator found that Amoco had just cause to discharge Seman, stating:

> "To begin with, the Company on September 14, 1973, had just cause to discharge the Grievant. He admittedly had in his possession Company equipment valued at over $30,000.00, which equipment he had no right to have." (Arbitrator's Award at 8.)

Thus, the collective bargaining agreement expressly stated that Amoco retained the right to discharge for just cause. The issue before the Arbitrator was whether Amoco had just cause to discharge Paul Seman, and the Arbitrator concluded that it had. When the Arbitrator found that Amoco had just cause to discharge Seman, he exercised the full extent of his authority under the collective bargaining agreement. The agreement expressly gave Amoco the right to discharge for just cause and, therefore, the Arbitrator was required to sustain Seman's discharge when he found that just cause existed.

The Arbitrator, however, ordered that Seman be reinstated by Amoco, without loss of seniority but without back pay. (Arbitrator's Award at 13.) He stated:

> "Thus, I find that as of October 6, 1975, the Company does not have just cause for discharging the Grievant, although they had just cause from the knowledge in their possession on September 14, 1973." (Arbitrator's Award at 13.)

Although the Arbitrator purports to base his award upon facts which were not known to the Company on September 14, 1973, an analysis of his award reveals that he did not rely upon any substantial and material facts which were discovered after that date. Indeed, the Arbitrator did not rely upon facts at all, but rather, he relied upon the unproven allegations of the grievant that unknown conspirators had placed over thirty thousand dollars worth of Amoco equipment in his basement. The Arbitrator explained his award as follows:

> "I am not convinced beyond doubt that the Grievant was aware of this Company material in his basement. The motives of Goevrnmental agencies, combined with their bizarre actions the week of September 11, added to by the apparent inability of the Fire Department to discover in 18 months what was found in a matter of a week or two by a qualified insurance investigator, all add up to a possible, though certainly in no way proved, alternative to the placement of the material in the Grievant's basement by himself. The Grievant alleges conspiracy, but has not proved it. Most frankly, however, he has raised enough doubts so that I believe the level of proof of his complicity in the possession of the Company property does not reach that required to sustain his discharge." (Arbitrator's Award at 12-13.)

The Arbitrator confirmed that he was not relying upon any fact in ordering Seman reinstated, when he denied back pay to the grievant. He stated:

> "What is the Company liability for their actions of September 14? The Grievant has admitted and I agree

with him, that he has no proof whatsoever of any Company involvement in any conspiracy. If an outside group conspired to 'set up' the Grievant so that he would be discharged, then the Grievant's remedy for his damages must be against that group, not against the Company, who acted with just cause when they acted. Therefore, I find that the Grievant is entitled to reinstatement without loss of seniority, but without back pay. If, in fact, some outside organization deprived the Grievant of two years employment and pay, which is not found herein to be a fact, then the Grievant will have to obtain, in other forums, satisfaction for that wrong." (Arbitrator's Award at 13.)

If conspirators placed a massive amount of Amoco equipment valued at over thirty thousand dollars in Seman's basement, they obviously carried out this conspiracy prior to September 14, 1973, when the grievant was discharged. There was no proof of such a conspiracy on September 14, 1973, and, as the Arbitrator repeatedly stated, there was no proof of such a conspiracy on October 6, 1975. In other words, there were no changes in circumstances or conditions between the date Seman was discharged and the date on which the Arbitrator made his award. If, as the Arbitrator found, Amoco had just cause for discharge on September 14, 1973, it must have had just cause on October 6, 1975.

The leading case in the area of judicial review of arbitration awards is *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593 (1960). In that case, the court set forth the standards for judicial review, as follows:

> "The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards.
>
> * * * * *
>
> "When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair

> solution of a problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations. The draftsmen may never have thought of what specific remedy should be awarded to meet a particular contingency. Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from any sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award." (363 U. S. at 596-597.)

The Seventh Circuit Court of Appeals recently reviewed the standards applicable to judicial review of arbitration awards. In *Cannon* v. *Consolidated Freightways Corp.*, ... F. 2d ....., 90 L. R. R. M. ..... (7th Cir. 1975). The court stated:

> "It is well settled that 'the refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements.' United Steelworkers v. Enterprise Wheel and Car Corp., 363 U.S. 593, 596, 46 LRRM 2423. Any other rule would thwart the federal policy encouraging settlement of industrial strife through means chosen by the parties. Id.; see 29 U.S.C. § 173(d). This judicial deference, to the arbitrator's decision is founded upon the desire to effectuate the decision of the union and company to employ arbitration and upon the belief that the circumstances surrounding arbitration insure fair treatment to the individual employee. Of course, a court may review and set aside an award if the grievance is not arbitrable (Local 81, American Federation of Technical Engineers v. Western Electric Co., Inc., 508 F. 2d 106, 88 LRRM 2081 (7th Cir. 1974); Los Angeles Newspaper Guild Local 69 v. Hearst Corp., 504 F. 2d 636, 87 LRRM 2597 (9th Cir. 1974), certiorari denied, 421 U.S. 930, 88 LRRM 3550), or the arbitrator exceeds his contractual authority. International Ass'n of Machinists, District 8 v. Campbell Soup Co., 406 F. 2d 1223, 70 LRRM 2569 (7th Cir. 1969), certiorari denied, 396 U.S. 820, 72

LRRM 2431; Torrington Co. v. Metal Products Workers Union, Local 1645, 362 F. 2d 677, 62 LRRM 2495 (2d Cir. 1966). Similarly, the court can review the award when the indicia of fairness are absent. For example, in Vaca v. Sipes, supra, the Court held that review was appropriate where the union breached its duty of fair representation. Other courts have recognized that the arbitrator's decision can be set aside where it is arbitrary or capricious (Mogge v. District 8, International Ass'n of Machinists, 454 F. 2d 510, 513, 78 LRRM 2939 (7th Cir. 1971); Yellow Cab Co. v. Democratic Union Organizing Committee Local 777, 398 F. 2d 735, 737, 68 LRRM 2812 (7th Cir. 1968), certiorari denied, 393 U.S. 1015, 70 LRRM 2225), or where the process is tainted by fraud or deceit. Margetta v. Pam Pam Corp., 501 F. 2d 179, 180, 87 LRRM 2161 (9th Cir. 1974); Bieski v. Eastern Automobile Forwarding Co., 396 F. 2d 32, 37, 68 LRRM 2411 (3d Cir. 1968)." 90 L. R. R. M. at 2999.

In the present case the Arbitrator's Award must be vacated on two of the above-mentioned grounds: (1) the Arbitrator exceed his contractual authority, and (2) his award was arbitrary and capricious.

The collective bargaining agreement in the present case specifically states that Amoco retains the right to "discharge employees for just cause." (Arbitrator's Award at 7.) Thus, the agreement vests in Amoco the exclusive right to make the initial decision as to whether just cause for discharge exists.

Amoco's decision that just cause exists is subject to review through the grievance procedure. The collective bargaining agreement states:

> " 'Section 2.19 The Company agrees to notify a Union representative within two (2) workdays following the discharge of any employee, who, at the time of such discharge, has to his credit more than ninety (90) work periods at the Whiting Refinery. The Union agrees that no issue will be made relative to such discharged employee, if an issue is not raised in writing prior to the expiration of fourteen (14) calendar days following the discharge of such em-

> ployee. Discharge and suspension grievances shall be introduced directly to the third stage of bargaining and shall become eligible for arbitration as promptly as possible without regard for the sequential numbering of grievances outlined in Section 2.10. If the Management's action of discharging such employee is reversed, and the employee is reinstated with no disciplinary action being taken in lieu thereof, then the employee will be paid in full by the Company for all wages lost as a result of the discharge.' " (Arbitrator's Award at 7.)

The clear and unambiguous meaning of the agreement is that an arbitrator will review Amoco's decision as to whether just cause existed and will sustain or reverse that decision. In the present case, the Arbitrator reviewed Amoco's decision and specifically found that Amoco had just cause for discharge. (Arbitrator's Award at 8.) Having found that Amoco had just cause, he proceeded to make his own independent, initial determination that just cause no longer existed two years after the discharge occurred. (Arbitrator's Award at 12-13.)

In this case, the Arbitrator exceeded his authority to review Amoco's decision to discharge Seman. He made two determinations as to the existence of just cause for discharge. First, he found that Amoco had just cause to discharge Seman on September 14, 1973, when the discharge occurred. In view of this finding, Amoco obviously did not violate the collective bargaining agreement when it discharged Seman.

The Arbitrator, however, made a second determination with respect to the existence of just cause. He found that just cause for discharge did not exist as of October 6, 1975. He was discharged on September 14, 1973 and Amoco either did or did not breach the collective bargaining agreement on that date. The authority of the Arbitrator was limited to resolving that question and, when he found that Amoco had just cause for discharge, his authority was fully expended.

Instead of confining himself to applying the terms of the collective bargaining agreement to determine if Amoco had

breached the agreement by discharging Seman in 1973, the Arbitrator placed himself in the role of management and proceeded to determine, ab initio, whether just cause for discharge existed as of October 6, 1975. He ignored the fact that he was limited to interpreting and applying the agreement and dispensed his own brand of industrial justice. This, by mandate of the United States Supreme Court, he was prohibited from doing.

As a result of the Arbitrator's failure to restrict himself to interpreting and applying the agreement, he ordered Amoco to reinstate Seman, even though he did not find that it had breached the collective bargaining agreement by discharging him. Indeed, he could not have found a breach of the agreement, since he found that Amoco had just cause for discharge at the time of the discharge. In the absence of a breach, however, Seman was properly discharged under the terms of the agreement and the Arbitrator clearly exceeded his authority by ordering Amoco to reinstate him.

The Seventh Circuit Court of Appeals has held that an arbitration award can be set aside if it is "arbitrary or capricious." *Cannon* v. *Consolidated Freightways Corp.*, ... F. 2d ....., 90 L. R. R. M. 2996, 2999 (7th Cir. 1975); *Mogge* v. *District 8, International Ass'n of Machinists,* 454 F. 2d 510, 513 (7th Cir. 1971). One type of arbitration award which falls within the category of being "arbitrary or capricious" is an award which is without foundation in reason or fact, as stated by the court in *Brotherhood of Railroad Trainmen* v. *Central of Georgia Ry. Co.*, 415 F. 2d 403 (5th Cir. 1969):

> "In the arbitration context, an award 'without foundation in reason of fact' is equated with an award that exceeds the authority or jurisdiction on the arbitrating body. To merit judicial enforcement, an award must have a basis that is at least rationally inferable, if not obviously drawn, from the letter or purpose of the collective bargaining agreement. The arbitrator's role is to carry out the aims of the agreement, and his role defines the scope of his authority. When he is no longer carrying out the agreement or when his position cannot be considered in any way rational, he has exceeded his jurisdiction. The requirement that the result of arbitration have 'foundation in reason or fact' means that the award must, in some logical way, be derived from the wording or purpose of the contract." (415 F. 2d at 411-412.)

In the present case, the Arbitrator's Award is without foundation in reason or fact and, therefore, it must be vacated on the ground that it is "arbitrary" and "capricious".

The grievant had in his basement over thirty thousand dollars worth of Amoco equipment. This equipment "covered space in a warehouse which probably measured 30′ x 15′, stacked up to several feet high." (Arbitrator's Award at 3.)

> "[M]any of the items . . . were too heavy for one man to lift and required two men to drag them across the floor and remove them from the basement." (Arbitrator's Award at 4.)

The grievant's only explanation as to how this massive amount of equipment got into his basement was that it was placed there by unknown conspirators, without his knowledge. No reasonable man could have believed this explanation. The Arbitrator recognized the absurdity of the grievant's allegations, stating:

> "To take the other side, however, if someone were to 'set up' the Grievant, why would that person or organization go to such extremes? The possession of even a few items of Company property would certainly be grounds for discharge. Why then fill a basement with tons of material? And how was this done, if it were done by someone without the knowledge of the Grievant? Again, no answers are forthcoming." (Arbitrator's Award at 12.)

The Arbitrator, nevertheless, held that just cause to discharge the grievant no longer existed on October 6, 1975, although just cause had existed at the time of his discharge. His decision is not based upon reason or fact. The Arbitrator's Award

is based entirely upon the grievant's allegations that he was subject to a conspiracy. Throughout his award, however, the Arbitrator repeatedly acknowledges that there was absolutely no proof of a conspiracy. (Arbitrator's Award at 10, 11, 12, 13.) More importantly, he refused to find that a conspiracy had, in fact, existed.

> "If, in fact, some outside organization deprived the Grievant of two years employment and pay, which is not found herein to be a fact, then the Grievant will have to obtain, in other forums, satisfaction for that wrong." (Arbitrator's Award at 13.)

Thus, the Arbitrator's Award, on its face, was not based upon proof or facts. It was not even based upon what the Arbitrator believed the facts to be. It is totally without foundation in reason or fact.

The Arbitrator's Award in the present case is distinguishable from other arbitration awards in which arbitrators have found that employers acted without just cause, basing their decisions upon facts which were unknown to the employers at the time of the discharge. In those cases, the arbitrators found that, even though the employers had acted in good faith, they had discharged employees without just cause. The arbitrators, therefore, were properly acting within the scope of their authority to review an employer's determination that just cause existed.

In the present case, however, the Arbitrator specifically found as a fact that Seman had Amoco equipment in his basement and that his possession of that equipment constituted just cause for discharge on September 14, 1973. (Arbitrator's Award at 8.) He then found that Seman's possession of Amoco equipment did not constitute just cause for discharge on October 6, 1975. (Arbitrator's Award at 13.) No new facts were considered by the Arbitrator which would explain why just cause existed on the earlier date but not on the later date. Seman's allegations of a conspiracy against him cannot be considered to be a distinction between the circumstances on the

two dates, because the Arbitrator refused to find that the alleged, but completely unproven, conspiracy had occurred in fact. (Arbitrator's Award at 13.) Thus, the Arbitrator did not base his award upon facts which were unknown to Amoco at the time of the discharge; he did not base his award upon facts at all.

The Arbitrator's Award is without foundation in reason or fact and, therefore, it is hereby vacated on the ground that it is "arbitrary" and "capricious".

For the reasons set forth above, Amoco Oil Company's "Motion for Order Vacating Award of Arbitration" is Granted.

Enter January 30, 1976.

/s/ Allen Sharp,
Judge, United States District Court.

ADDENDUM

After the above order was prepared and before it was filed the defendants filed a brief on January 29, 1976. The Court has carefully reviewed said brief. Although the same is well written it does not persuade the Court to change the reasoning and result reflected in the above order.

January 30, 1976.

/s/ Allen Sharp,
Judge, United States District Court.

UNITED STATES DISTRICT COURT

* * (Caption—H-75-243) * *

ORDER

The Court has before it the motion for reconsideration filed by the defendant on February 9, 1976 and the response thereto filed by the plaintiff on February 19, 1976. Although not cited by either party there are two recent cases that the Court has found that cause it to pause and reconsider its order of January 30, 1976 in this case. Those cases are *United Electrical Radio and Machine Workers of America and Local 1114 United Electrical Radio and Machine Workers of America* v. *Honeywell, Inc.*, 522 F. 2d 221 (7th Cir. 1975), and more recently, the case of *International Union of Operating Engineers, Local Union No. 139* v. *Carl A. Morse, Inc.* ..... F. 2d ..... (No. 75-1190 slip opinion dated February 10, 1976).

The language in both of those cases raises some concern with the Court about its order of January 30, 1976.

The Court feels that it should have the benefits of further briefing and oral argument before this matter is finally resolved.

Therefore, the motion to reconsider is now Granted and this Court's order of January 30, 1976 is now set aside.

The Court now assigns this matter for oral argument on Thursday, March 25, 1976 at 3:00 o'clock P.M. in the Court Room of the Federal Court House in Hammond, Indiana.

Enter February 26, 1976.

/s/ Allen Sharp,
Judge, United States District Court.

UNITED STATES DISTRICT COURT

* * (Caption—H-75-243) * *

ORDER

This Court must determine whether it should judicially intervene to set aside an arbitrator's award. It is elemental that a district court must not review the merits of an arbitration award. See *United Steel Workers* v. *Enterprise Wheel and Car Corp.*, 363 U. S. 593, 80 S. Ct. 1358, 4 L. Ed. 1424 (1960). A recent application is found in *Cannon* v. *Consolidated Freightways Corp.*, 524 F. 2d 290 (7th Cir. 1975). A district court must suppress any tendency to replace its evaluation of the facts for that of the chosen arbitrator. In this case that temptation is great. Very reluctantly, this Court has determined that these well established rules require it to refrain from upsetting this award. Therefore, the award must stand and the plaintiff's motion to vacate is Denied.

Enter April 13, 1976.

/s/ Allen Sharp,
Judge, United States District Court.

UNITED STATES DISTRICT COURT

* * (Caption—H-75-243) * *

ORDER

This Court must determine whether it should judicially intervene to set aside an arbitrator's award. It is elemental that a district court must not review the merits of an arbitration award. See *United Steelworkers* v. *Enterprise Wheel and Car Corp.*, 363 U. S. 593, 80 S. Ct. 1358, 4 L. Ed. 1424 (1960). A recent application is found in *Cannon* v. *Consolidated Freightways Corp.*, 525 F. 2d 290 (7th Cir. 1975). A district court must suppress any tendency to replace its evaluation of the facts for that of the chosen arbitrator. In this case that temptation is great. Very reluctantly, this Court has determined that these well established rules require it to refrain from upsetting this award. Therefore, the award must stand and the plaintiff's motion to vacate is Denied, and the Defendants' Motion to Confirm and Enforce is Granted.

Enter April 13, 1976.

/s/ Allen Sharp,
Judge, United States District Court.

APPENDIX III

In the Matter of the Arbitration between AMOCO OIL COMPANY WHITING REFINERY and OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION LOCAL 7-1, INC., AFL-CIO.	FMCS No. 75K/06635 Discharge of Paul A. Seman (Whiting 73-82).

REPORT AND DECISION OF ARBITRATOR

In these proceedings, a single grievance was submitted for an Award to James P. Martin, appointed by the Federal Mediation and Conciliation Service to serve in the capacity of Impartial Arbitrator. Hearings were held at Whiting, Indiana on April 23 and 30, 1975, at which the Parties were fully heard. The following appearances were entered:

The Union
Mr. Andrew Pavlo, President, Local 7-1
Mr. James F. Smith, Secretary-Treasurer
Mr. Ken G. Warner, OCAWIU, Representative
The Company
Mr. Joel D. Root, Manager, Employee Relations
Mr. Terrance Rindal, Labor Relations Consultant

Briefs were filed with the Arbitrator on June 30, 1975.

ISSUE

Was the Grievant, Paul Seaman, discharged for just cause? If not, what is the remedy?

NATURE OF CASE.

The Grievant has been an employee of the Company since before World War II. For a number of years, Mr. Seman has assumed the role of "watchdog" for the citizens of Whiting against governmental decisions and actions which the Grievant felt were not in the best interest of those citizens. To paraphrase the statement concerning the Grievant contained in the Union's Post-Hearing Brief, he was "active in civic affairs, pollution, and school affairs, had been active in suits against the Company and the City Administration, had taken pictures of Company facilities (indicating violation of anti-pollution laws and Ordinances), disrupted City meetings, delayed City projects, was an outspoken critic of City Administration, and was getting in everyone's hair and causing problems." Evidence revealed that the Grievant was a plaintiff in suits against the City and against the Company, had been arrested at the order of the Mayor and had won a dismissal, and in general had driven the City Administration of Whiting to the point of distraction.

At 11:00 p.m. on September 11, 1973, the Whiting Fire Department answered a "fire in progress" call to the Grievant's home. In battling the blaze in the Grievant's basement, fire department personnel noted equipment with AMOCO markings on them. The fire was eventually put out. The following morning at approximately 10:00 a.m., fire and police investigators reviewed the situation in the Grievant's basement and took many photographs of the basement and its contents. Seen in photographs were many items of equipment which belonged to AMOCO. This fact was not disputed by the Grievant. The record was replete with evidence of Company equipment being in the Grievant's basement, and since there was no denial that the equipment was there, it is taken as true.

The following day, September 12, shortly before 5:00 p.m., the Whiting Police Department placed the Grievant's residence under surveillance, since the Company had been informed of

their equipment being in the Grievant's basement, and the police wished to prevent the unobserved removal of any of this equipment prior to action being taken. That action was taken on the following day, September 13, in the form of a search warrant. Shortly before 6:00 p.m., Whiting Police, accompanied by Company officials, served the search warrant and began to remove equipment belonging to the Company from the Grievant's basement. Approximately $30,000.00 worth of equipment was removed, including items such as the following:

43 Chain Lifts	7 Chipping Guns
11 Ladders	3 Jackhammers

The equipment covered space in a warehouse which probably measured 30′ x 15′, stacked up to several feet high. It took 4 to 6 hours to finish removing all of the equipment from the Grievant's basement and loading it on flat bed trucks. This ran until late in the evening, and during the time of the removal of the equipment, practically the entire City Government turned out to watch the activities. Unrebutted testimony revealed that practically the entire City Government was in attendance, including the City Judge, the City Attorney, the City Engineer, six out of seven Councilmen and the Mayor, among others. Evidence further showed that a table was set up and coffee and doughnuts were being dispensed by several wives and secretaries of the above.

Criminal charges were filed against the Grievant, but the search warrant was ultimately quashed, and the evidence suppressed. The charges were thereupon dismissed, and the Grievant was freed of any criminal charges as a result of the equipment being found in his home.

A private investigator hired by an insurance company made an investigation of the fire and determined without any doubt whatsoever that it was a case of arson, being set in two different locations in the basement with petrochemical incendiary devices. To the contrary, the City was unable to determine the cause of the fire, and did not, as of the time of the Hearing, know what caused the fire.

Testimony of the Chief of the Whiting Fire Department revealed that he was called by the Captain on the scene and was there within 10 to 20 minutes. The Fire Chief brought with him a Captain of Detectives and a photographer. The Chief further testified that fire captains normally call him out only when they think the fire is a large one or is going to be of any magnitude. In conclusion, he stated that the fire at the Grievant's house was a small one.

Testimony revealed that many of the items in the basement of the Grievant's home, belonging to AMOCO, were too heavy for one man to lift and required two men to drag them across the floor and remove them from the basement. Further unrebutted testimony revealed that the Grievant did not drive, did not own a car, and was always seen going to and coming from work on a bicycle.

CONTENTIONS

The Union says that it does not make sense that the Grievant started the fire with his wife, son and two visitors in the house, to call attention to the fact that he knowingly had AMOCO property in his home; that it is unlikely he would have instructed someone to call the fire department, had he known stolen equipment was at the scene of the fire; that the Grievant, in expressing his opinions and beliefs as the "watchdog" for the City of Whiting was getting in everyone's hair and causing problems; that evidence indicated that many people wanted the Grievant "gagged and bound" thus denying him the citizen's right to express his views and opinions; that the appearance at the "small" fire of the Fire Chief, a Captain of Detectives, and a photographer were all totally out of the normal for the type of fire; that these people are called only in the case of a large fire or one of a magnitude which is likely to increase; that it may well be the reason they were there was that they were aware that AMOCO equipment would be found at the scene of the fire; that the City officials had a carnival when the search warrant was

served and the search made, further indicating the possibility of a conspiracy to get the Grievant "out of the hair of the City;" that no evidence tended to prove that the Grievant knew the Company property was in his basement, nor that he put it there; that the evidence shows that the fire was incendiary in nature; that the Company's posted Rule No. 7, to quote a recent arbitrator's award at the Whiting Plant, "is too vague to be fair and reasonable. It is subject to so many interpretations that they are far beyond the realm within which efficiency of operations exist."; that Rule 7 thus is not the basis, or should not be the basis, for any discharge action; that posted Rule No. 1 covers violation of any laws, of which the Grievant is not only not guilty but not even charged at the present time, nor will he be in the future for the facts concerning the discharge; that clear and convincing proof of guilt in cases involving moral turpitude is always required in arbitration; that there has been no proof of the violation by the Grievant of posted Rules 1 and 7 and the discharge is therefore improper; that the grievance should be allowed, and the Grievant reinstated to his employment with full seniority benefits and back pay.

The Company says that the evidence presented by the Company proved conclusively that the Grievant had material which was the property of the AMOCO Oil Company, and valued at over $30,000.00, in his possession; that the Grievant was not authorized to have this material in his possession; that the Union's evidence did not establish that the Company material was not in his possession, did not establish that the Grievant had no knowledge of the material, did not substantiate the Grievant's allegation that the material was "planted" at his house without his knowledge, did not show how or by whom the alleged plant was perpetrated, and did not in any way prove a conspiracy existed; that based upon the preponderance of the evidence, the discharge of the Grievant was for just cause and the grievance should be denied.

APPLICABLE CONTRACT PROVISIONS.

Contract

"Preamble

". . .

"It is not the purpose of this Agreement in any way to infringe or impair the normal Management rights of the Company except as otherwise expressly provided. Included among the Management rights unaffected are the right to hire and the right to discipline or discharge employees for just cause.

"Article II—Grievance Procedure

". . .

"Section 2.19. The Company agrees to notify a Union representative within two (2) workdays following the discharge of any employee who, at the time of such discharge, has to his credit more than ninety (90) work periods at the Whiting Refinery. The Union agrees that no issue will be made relative to such discharged employee, if an issue is not raised in writing prior to the expiration of fourteen (14) calendar days following the discharge of such employee. Discharge and suspension grievances shall be introduced directly to the third stage of bargaining and shall become eligible for arbitration as promptly as possible without regard for the sequential numbering of grievances outlined in Section 2.10. If the Management's action of discharging such employee is reversed, and the employee is reinstated with no disciplinary action being taken in lieu thereof, then the employee will be paid in full by the Company for all wages lost a result of the discharge.

Standard Oil Company (Indiana)

"In accordance with its past policy, the Company is posting herewith a list of the offenses for which an employee may be suspended or discharged without further notice. This is done in order that all employees may be informed

fully as to the offenses for which such suspensions or discharges may be made. There is also appended a statement concerning the issuing of written notices for offenses other than those shown in the list.

"Offenses for Which an Employee May Be Suspended or Discharged Without Further Notice

"1. Violation of any law. Special attention is called to the following:

"(a) Carrying concealed weapons; fighting or attempting bodily injury to another; drunkenness; conduct which violates the common decency or morality of the community.

"(b) Stealing, or malicious mischief resulting in the injury or destruction of property of other employees or of the Company.

"(c) Cruelty to animals which are the property of other employees or of the Company.

". . .

"7. The possession of or exercise by any employee of any habits, demeanor, characteristics, action or course of action that makes him objectionable to other employees or the management or that makes his retention in the service disruptive of a spirit of harmony therein or would cause other employees to leave the service.

". . .

"Notices in Writing for Other Offenses

"For offenses other than those listed above, an employee shall not be suspended or discharged without first having been notified in writing that a repetition of the offense will make him liable to suspension or discharge."

DISCUSSION.

To begin with, the Company on September 14, 1973, had just cause to discharge the Grievant. He admittedly had in his possession Company equipment valued at over $30,000.00, which equipment he had no right to have. The question with which we must grapple is whether the Company still had just cause at the conclusion of the arbitration hearing. As will be shown, it is the finding that the Company did not ultimately have just cause to discharge the Grievant.

The Grievant was not an ordinary man. In almost every element of his life style, he marched to the beat of a different drummer than the rest of the world. He evidenced an extraordinary contempt for the *indicia* of success common to most: he did not drive nor own a car, dressed in a most odd manner, and patently held the opinion that most people had of him in complete contempt. His life style was also different; few of us keep our refrigerators in our dining rooms, and have to eat standing up because there is no room to sit down. From the photographs admitted in to the Hearing, he had an extraordinary tolerance for disorder in his home, to the point where he was unable to promptly differentiate between his kitchen and his dining room when photographs of one was shown to him, in fact, initially misidentifying the room. The condition of his basement storage can be generously described as chaotic.

In relations with his peers, he was equally contemptuous of the impression he gave to most others. He sued, to his own possible detriment, the Government of the City in which he resided, the Employer for whom he worked, even the school district where he sent his children. He challenged the authority and the accountability of sanitary districts, of school boards, of City commissions, of the City Council, of the Mayor, all in the name of civic betterment or environmental improvement. The Grievant alleged a conspiracy against him in the facts which caused his

discharge, and there was certainly no lack of motive on the part of numberless groups to do what he charged.

But the Grievant does not stand alone in his peculiarities. His conduct is almost equalled, in other ways, by the bizarre actions of the City officials involved in the incidents of September 11-14, 1973. A fire occurred in the Grievant's basement which, according to the unequivocal testimony of a highly trained fire investigator, was arson, plain and simple. The investigator testified he had investigated over 1200 fires, and was absolutely certain of the conclusion he drew. Yet 18 months later, at the time of the Hearing, the City still did not know the cause of the fire.

Again, the Captain called for the Fire Chief to assist him at what was described as a "small fire." When the Fire Chief responded, he brought with him a Captain of Detectives and a photographer. The Grievant claimed that this was because the Fire Department knew they would find equipment belonging to the Company in his basement and, therefore, intended to document it well. The charge is not the proof, but the officials involved were unable to give any satisfactory answer as to why they had assembled so quickly at the scene, according to the Fire Chief within 10 minutes or so after the first response. On September 13, when the search warrant was served, the actions of the City officials became indeed bizarre. The scene was described as a "Roman Carnival," and the description seems apt. While teams of police and Company employees were unloading the Grievant's basement into trucks, wives and secretaries of the City officials, who assembled almost in total force at the scene, served coffee and doughnuts. The fact that there was glee at the fact that the "gadfly" had hopefully had his stinger pulled, was not surprising, but the extent and expressions of that glee have to lend a touch of credence to the charges of the Grievant. Would a Government which reacted so cheerfully at the downfall of an opponent also do anything to create that downfall? There was no proof presented of this, either, but it is a valid question to ask.

We are left with the question of how the material belonging to AMOCO, and seized by the police, arrived in the Grievant's

basement. There were literally tons of equipment recovered by the police on September 13. How did it get in the Grievant's basement, when the Grievant had no car, no driver's license, and the equipment obviously could not be transported on a bicycle? Given a motive, perhaps a means of acquiring this property illegally might be assumed. But the "why" is as large a question as the "how." Not only how did the Grievant obtain and transport all of the AMOCO material, but why did he do it. The Grievant can be easily classified as "peculiar." But this peculiarity in no way was shown to be in the field of moral inadequacy. Rather, the very opposite is true. The main objections to the Grievant's carrying on was an excess of moral zeal, to the detriment of almost every governmental organization he came in contact with. The Grievant seemed to exhibit stronger moral tendencies in the question of honest government, responsibility, accountability, and ecology than anyone with whom he dealt. There was no showing by anyone at any time that the Grievant suffered from acquisitiveness which would require him to steal, or of his complicity with any individual or group who might be inclined to be in the stealing business, nor any other activity or leaning which would suggest him as a thief. The Grievant himself testified that he was aware that he had to be "purer than Caesar's wife" because he was daily flying in the face of the power structure, and was susceptible to being discredited if he fell below the highest plane of moral conduct. His actions suggest that he was aware of the standard, and guided himself accordingly. Why then would he fill his basement with stolen property, the utility of which was highly questionable (what does one do with a 300-pound drill with "AMOCO" burned into it, or with 43 Chain Hoists?). The answer to "why" was not supplied by any of the evidence at the Hearing.

To take the other side, however, if someone were to "set up" the Grievant, why would that person or organization go to such extremes? The possession of even a few items of Company property would certainly be grounds for discharge. Why then fill a basement with tons of material? And how was this done, if it

were done by someone without the knowledge of the Grievant? Again, no answers are forthcoming.

I accept this fact, that the Grievant's home was set afire by "person or persons unknown." I accept this fact, that the Grievant did not commit this arson. I am not convinced beyond doubt that the Grievant was aware of this Company material in his basement. The motives of Governmental agencies, combined with their bizarre actions the week of September 11, added to by the apparent inability of the Fire Department to discover in 18 months what was found in a matter of a week or two by a qualified insurance investigator, all add up to a possible, though certainly in no way proved, alternative to the placement of the material in the Grievant's basement by himself. The Grievant alleges conspiracy, but has not proved it. Most frankly, however, he has raised enough doubts so that I believe the level of proof of his complicity in the possession of the Company property does not reach that required to sustain his discharge.

Thus, I find that as of October 6, 1975, the Company does not have just cause for discharging the Grievant, although they had just cause from the knowledge in their possession on September 14, 1973.

What is the Company liability for their actions of September 14? The Grievant has admitted, and I agree with him, that he has no proof whatsoever of any Company involvement in any conspiracy. If an outside group conspired to "set up" the Grievant so that he would be discharged, then the Grievant's remedy for his damages must be against that group, not against the Company, who acted with just cause when they acted. Therefore, I find that the Grievant is entitled to reinstatement without loss of seniority, but without back pay. If, in fact, some outside organization deprived the Grievant of two years employment and pay, which is not found herein to be a fact, then the Grievant will have to obtain, in other forums, satisfaction for that wrong.

AWARD.

That the grievance shall be, and hereby is, allowed. That the Grievant shall promptly be reinstated to his employment with the Employer, without loss of seniority but without back pay.

/s/ James P. Martin,
James P. Martin,
Impartial Arbitrator.

Chicago, Illinois.
October 6, 1975.